University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, Except July, August and September, by the University of Pennsylvania Law School, at 236 Chestnut Street, Philadelphia, Pa., and 34th and Chestnut Streets, Philadelphia, Pa.

SUBSCRIPTION PRICE, $2.50 PER ANNUM; SINGLE COPIES, 35 CENTS

NOTES.

CARRIERS—WHAT CONSTITUTES AN INTERSTATE SHIPMENT?—Inasmuch as the federal government and the states have different requirements as to the limitation of liability and the giving of notice in case of loss or damage, and have different rates for the various services, and different regulations as to hours of employment, equipment, *etc.*, it must be noticed in each case whether the shipment has been intrastate or interstate, so as to determine whether the national or state authority applies. Ordinarily this is not perplexing but in numerous cases the question has arisen in such a manner as to make its solution difficult.

This is shown in a recent Missouri case[1] where there was a continuous shipment between points in different states. The line of the carrier to whom the goods were originally delivered did

[1] State v. Nortoni, 181 S. W. 995 (1916).

not extend beyond the state, but at the end of this line the goods were transferred to a second carrier and were taken into another state. It was held to be an intrastate shipment insofar as the original carrier participated in it.

In dealing with cases of this nature the courts have failed to lay down any definite test whereby the character of the shipment may be determined and the result of the decisions may be best understood by reviewing a few of the cases of high authority. In the first place it cannot be disputed that if a carrier participates in an interstate shipment, it is subject to federal regulation although its line may lie wholly within the limits of the state.[2] Such a rule, however, in no way determines what is interstate commerce, although it is cited in some cases for such a purpose, but merely states that all carriers, regardless of situation, transporting interstate commerce can to that extent be regulated by Congress.

An important case dealing with the question presented in the principal case is *Gulf Railway Company* v. *Texas*,[3] in which a shipment was made from another state to a point in Texas. After several days a new bill of lading was taken out and the goods sent to another point in Texas in the same cars, the seals not having been broken. The court held that the last stage of the transit must be regarded as intrastate commerce, and declared the intention of the shipper immaterial in determining the nature of the transportation.

Several years later the court dealt with the same problem in *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*.[4] In that case an exporter, who was given the privilege of doing business on one of the railroad's piers had cottonseed consigned to him from points within the state. At the pier it was ground into meal, sacked, and later exported. It was decided that the shipment to the pier from within the state was interstate commerce. In this case the court was undoubtedly anxious to declare this movement an interstate shipment so that they might bring this carrier within the scope of federal legislation and thereby do away with an undue preference granted exclusively to this one exporter, as the decision shows a departure from the rules of the preceding decision. The shipment, declared by the court to be interstate, was made under a bill of lading which covered only the transit within the state, and at the end of this shipment the goods were actually manufactured into a different form and held for some time before being reshipped. The court said that although the original contract of carriage had been completed within the state, still it was the intention of the purchaser to send the goods

[2] The Daniel Ball, 77 U. S. 557 (1870).

[3] 204 U. S. 403 (1906).

[4] 219 U. S. 498 (1910); *accord*, Railroad Commission v. Worthington, 225 U. S. 101 (1912).

in foreign commerce, and the court would be guided by that intention; and yet in the Gulf Railway case,[5] this same court said the intention as to future disposition was immaterial.

In the case of *Texas, etc., Railway* v. *Sabine Tram Company*,[6] where lumber was shipped between two points under a local bill of lading and afterwards reshipped in foreign commerce, it was held that the initial shipment was an interstate carriage. The decision reaffirmed the point of the prior case that the form of the bill of lading should not determine the question and declared that the character of the shipment must depend on "the essential nature of the commerce". It is obvious that such a test is of very little, if any, practical value as the whole problem is to determine what is the essential nature of the commerce.

The last decision of the Supreme Court upon this question is interesting in that it seems to depart from the rules of two preceding cases and closely follows the decision of the first case considered, the Gulf Railway case. In *Chicago, etc., Railway* v. *Iowa*, coal was shipped from points in Illinois to Iowa and there reshipped to various towns in the state. This practice was resorted to by the shippers so as to benefit by the local rates, the sum of which was less than the through interstate rate. The railroad thereupon refused to carry coal after the reconsignment unless the coal was transferred to their own cars, and later refused to obey an order issued by the state commission compelling them to carry the coal. The Supreme Court held that the order must be obeyed as the final shipment was one of intrastate commerce. In this case no importance was attached to the fact that the shipments were made in this manner so as to secure a rate lower than the interstate rate.

Finally, in a late case decided by the Interstate Commerce Commission,[8] in which shippers of oil divided the transit so as to profit by a low intrastate rate it was held that the regular interstate rate must be paid, since the practice was nothing more than a scheme to have the oil delivered at a rate lower than the lawful rate. The Commission seemed to base their decision on the ground that it was the intention of the shipper to make an interstate shipment ultimately, although separate bills of lading were taken out. This test, the intention of the shipper, was set forth in the Gulf Railway case,[9] but was rejected in the Pacific Terminal case.[10] The

[5] *Supra*, note 3.

[6] 227 U. S. 111 (1912); *accord*, Louisiana v. Texas and Pacific Railway, 229 U. S. 336 (1912).

[7] 233 U. S. 334 (1913).

[8] Kanotex Refining Co. v. A. T. and S. F. Rwy. Co., 34 I. C. C. 271 (1915).

[9] *Supra*, note 3.

[10] *Supra*, note 4.

Commission also laid much stress on the fact that it was a scheme to secure lower rates, and yet in the case just preceding the Supreme Court did not consider this element in reaching their decision, although the same practice existed.

The problem involved in all these decisions is vital alike to the carrier and the shipper. Clearly it would be unwise to adopt as a test the form of the contract of shipment because, as is shown in the cases, that would afford an easy method of evading federal control in a great many instances. Nor would it be satisfactory to say that the question must be decided by the essential nature of the commerce. It is suggested that the courts might hold that where there is an intent to consign the goods to some ultimate point beyond the state borders, then in all cases, except where the goods are held up to be manufactured into a different form, or to be stored for a long period or where in some other manner the regular continuity of the shipment is broken, the movement will be regarded as interstate commerce until that ultimate point is reached. Such a rule could be easily applied in practically all cases and would not only prevent attempts to avoid federal authority but would also render the law certain where it is now uncertain, and thus avoid endless confusion.

J. McK. B.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—STATE LEGISLATION DISCRIMINATING AGAINST ALIENS.—Several cases recently decided by the Supreme Court of the United States tend to indicate how far a state may go in enacting legislation discriminating against aliens. This question is of practical importance, in view of the attitude of many of the states toward foreigners, notably that of California toward the Japanese. The most common form of discriminatory legislation of this sort consists of statutes denying to aliens the right to labor or to engage in certain trades.

In *Truax* v. *Raich*[1] the Supreme Court had to decide upon the validity of an Arizona statute which provided that every person employing more than five workers at one time, regardless of the kind of work, should employ not less than eighty per cent qualified citizens of the United States. On the complaint of a native of Austria, engaged as a cook in an Arizona restaurant and threatened with dismissal as a result of the statute, it was held that the act was unconstitutional because in violation of that clause of the Fourteenth Amendment which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The court held that since the authority to admit or exclude aliens is solely in the federal government, a statute could not deny to

[1] United States Supreme Court Advance Opinions, Dec. 1, 1915, p. 7.

aliens, lawfully admitted, the opportunity to earn a living, since such denial is practically the same as preventing their entrance and abode, on the theory that "they cannot live where they cannot work."

So far as its actual decision goes, this case does not declare any new principle, but merely reiterates the doctrine established in the leading case of *Yick Wo* v. *Hopkins*,[2] namely, that aliens are protected by the provisions of the Fourteenth Amendment.[3] The opinion of the court, however,[4] is illuminating because it tends to clarify the issue as to the relation of the police power of the states to statutes discriminating against aliens, an issue considerably confused by the discussions of several state courts.

In *Trageser* v. *Gray*[5] the Court of Appeals of Maryland decided that a statute which denied to aliens the right to obtain a liquor license, but allowed all other persons to become licensed liquor retailers, was not in violation of the equal protection clause of the Fourteenth Amendment.[6] The court apparently reached its conclusion on the ground that the police force of the state is supreme and unrestricted. To what conclusion such reasoning may lead is well illustrated by the Massachusetts case of *Commonwealth* v. *Hana*,[7] where it was decided that a state in the exercise of its police power may grant peddling licenses to citizens only. Because the business of peddling enables one to practice fraud, the court says, it is a proper subject for state regulation. It is obvious that this argument may apply with equal force to almost any trade or occupation.

The fallacy underlying the doctrine of these cases is the notion that the police power of the states is unrestricted, and unlimited. As a matter of fact, the federal Constitution has made numerous restrictions upon the police power, notably the limitations imposed by the commerce clause. It is true that a valid exercise of the police power is paramount to the Fourteenth Amendment,[8] but it is equally true that the legislation which purports to be a police

[2] 118 U. S. 356 (1885), where an ordinance of the city of San Francisco was struck down because it was so enforced as to withhold from the Chinese the right to pursue the laundry business.

[3] In accord is Fraser v. McConway and Torley Company, 82 Fed. 257 (1897) where a Pennsylvania statute which imposed upon employers of unnaturalized male persons a tax of three cents per day for each day every such person was employed, and authorized the employer to deduct the amount of the tax from the wages of such employees, was held unconstitutional.

[4] In the principal case, *supra*, note 1.

[5] 73 Md. 250 (1890).

[6] The Pennsylvania Act of May 13, 1887, P. L. 108, Sec. 2, similarly provides, as do many state statutes, that licenses for the retail sale of liquors shall only be granted to citizens of the United States. Its validity was not questioned in *In re* Hay's License, 3 Mont. Co. Reg. 188 (1887).

[7] 81 N. E. 149 (Mass. 1907).

[8] Barbier v. Connolly, 113 U. S. 27 (1885).

measure must have a real and substantial relation to the end sought to be accomplished. The Maryland court failed to indicate what possible relation the discriminatory statute had to the health, safety, or morals. Furthermore, while it is true that the states can prohibit the sale of liquor altogether, it would seem that until made unlawful, the liquor business is one in which, subject to proper regulations, all persons may engage. A regulation forbidding aliens to sell liquor or to peddle, merely because they happen to be aliens, is, it is submitted, arbitrary and improper, and in violation of the equal protection clause of the Fourteenth Amendment.

Following the reasoning here suggested, the Maine case of *State* v. *Montgomery*[9] decided that a statute similar to the one considered in *Commonwealth v. Hana*[10] was unconstitutional. In answer to the contention that the state could, in the exercise of its police power, forbid aliens to peddle, the court said, "It must be noticed that the discrimination is not against a class, as criminals, as paupers, as intemperate, as disqualified by character or habit, or as harmful to society, but a class solely as aliens. Such a discrimination is forbidden." And similarly in *Templar* v. *State Examiners*[11] it was held that a statute prohibiting aliens from being barbers, the barber business being admittedly subject to police regulations by the state, was unconstitutional because it violated the equal protection clause.

A case which may be considered, on first blush, an authority in support of the doctrine of *Trageser* v. *Gray*,[12] is the Supreme Court decision of *Patsone* v. *Pennsylvania*.[13] It is submitted, however, that this case has no bearing whatever upon the question of the police power of the state. The Pennsylvania act of May 8, 1909, which was there held constitutional, made it unlawful for unnaturalized residents to kill wild game, and to that end made the possession of shot guns and rifles unlawful. The court did not sustain this statute as a legitimate exercise of the police power, but rather because the subject-matter of the legislation was wild game. The statute, it was pointed out by Mr. Justice Holmes, did not prohibit the possession of all deadly weapons, but only those peculiarly appropriate to hunting wild game, *viz.*, shot guns and rifles. It is well settled that a state, in regulating the public domain or the common property and resources within its jurisdiction, may discriminate in favor of its own citizens as against both aliens and citizens of other states. In *Truax* v. *Raich*,[14] Mr. Justice Hughes interprets *Patsone* v. *Pennsylvania*[15] as analogous in principle to the

[9] 94 Me. 192 (1900). See also 4 Harv. L. Rev. 337 (1891).
[10] *Supra*, note 7.
[11] 131 Mich. 254 (1902).
[12] *Supra*, note 5.
[13] 232 U. S. 138 (1914).
[14] *Supra*, note 1.
[15] *Supra*, note 12.

case of *McCready* v. *Virginia*,[16] where the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the state. This judicial interpretation clearly shows that the Pennsylvania statute forbidding aliens to possess rifles and shot guns was upheld not because it was a proper exercise of the police power, but because it sought to protect the wild game of the commonwealth.[17]

It therefore may be stated definitely that, so far as the Supreme Court has decided the question, a state, although avowedly exercising its police power, cannot deny to lawful inhabitants, merely because of their race or nationality, the ordinary means of earning a livelihood.

There is, however, one class of work from which aliens may be barred by the states. In the two recent cases of *Heim* v. *McCall*[18] and *Crane* v. *New York*,[19] the Supreme Court of the United States sustained a New York statute providing that only citizens of the United States should be employed in the construction of public work for the state or any of its municipalities. The court reaffirmed the doctrine laid down in *Atkins* v. *Kansas*:[20] "It belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities."

Alienage, as opposed to citizenship, may, therefore, be made the basis of legislative classification in certain cases, as where the subject-matter of the legislation is the right to own or inherit real property, to shoot wild game, to plant oysters, to be employed by the state, *etc.*[21] It is submitted, however, that in the exercise of the police power, alienage cannot be a proper basis of classification, for there is in the nature of things no real and substantial relation between such discrimination and the promotion of the health, safety, morals, and welfare of those within the jurisdiction of the state.[22]

L. E. L.

[16] 94 U. S. 391 (1876).

[17] The Pennsylvania Act of June 1, 1915, P. L. 645, goes still further. "To give additional protection to wild birds and game within the state" it makes unlawful the possession by aliens of *dogs of any kind*. Whether this statute comes within the decision of the principle of Patsone v. Pennsylvania is questionable, to say the least. There can be no reasonable connection between the possession by an alien of a pet dog and the legislative desire to preserve the wild game of the state.

[18] 36 Sup. Ct. Rep. 78 (1915).

[19] 36 Sup. Ct. Rep. 85 (1915).

[20] 191 U. S. 207 (1903).

[21] As to the rights of Japanese in California Schools see 16 Yale L. Jour. 90 (Dec., 1906).

[22] *Supra*, note 8, note 17; State v. Montgomery, *supra*, note 9; Templar v. State Examiners, *supra*, note 11.

DIVORCE IN ENGLAND—RECRIMINATION—A CONTRAST—When told of the inequality of the English law in the case of women we are all more or less incredulous. But two cases printed side by side in a recent number of the *Law Times* depict more eloquently than a dozen addresses the extraordinary double standard of morals that prevails in a country so advanced in some respects, yet so backward in others. The facts briefly digested are sufficient without comment.

In *Goddard* v. *Goddard*[1] the wife, the petitioner, testified that from the commencement of the married life the respondent, the husband, had treated her with the grossest cruelty, frequently blacking her eyes. On one occasion he seized her by the hair and dragged her out of bed. On another, he knocked her down in the street when she was carrying a child and the child died in consequence. In 1902 he deserted her and went to live with another woman with whom he thereafter resided. The petitioner then went to work in a factory but her health gave way and her earnings fell to nine shillings a week. Her children were both delicate, one of them consumptive. She consulted a solicitor about a divorce but the costs were prohibitive. She then went to work as a housekeeper and after her employer's death lived with his son as his mistress because he took pity on her and was willing to make a home for her children. He was now anxious to marry her if the court were to grant her a decree. The court said: "I do not think the husband's conduct ought to have conduced. It may have conduced but I do not think it ought to have done so." The petition was dismissed.

On the following day before the same judge was heard the case of *Clutterbuck* v. *Clutterbuck*.[2] There the petition was by a minor suing by his father as guardian for a dissolution of his marriage. The testimony was that the petitioner, nineteen years of age, met the respondent while at a public school; that in December of 1914 he obtained a commission in a regiment and married the respondent January 23, 1915. They were together only occasionally and at the end of March, 1915, the respondent went away with the co-respondent, writing to the petitioner that she was going to leave him forever. The petitioner testified that in consequence of this letter he was terribly depressed and while in a state of despair committed adultery on two occasions. The court said: "The letter of 31st March may have caused absolute desperation, and I think that the petitioner's adultery was the direct result of his wife's conduct towards him. In the special circumstances of the case I will exercise my discretion and grant the petitioner a decree *nisi*."

W. H. L.

[1] 113 LAW TIMES 1063 (1915).
[2] 113 LAW TIMES 1063 (1915).

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ABOLITION OF REMEDY AGAINST THIRD PERSONS—A very nice problem arising under workmen's compensation laws is that involving the situation where a workman has been injured under such circumstances as to create a legal liability in some third person, not the employer, although the injury has occurred in the course of the employee's employment and upon the premises of the employer. Is the workman's right to sue such third person abolished, or is the workman forced to elect between the third person and the employer in his recovery of compensation, or has he a double remedy?

The Washington act [1] provides that each workman "who shall be injured whether upon the premises, or at the plant, or, he being in the course of his employment, away from the plant of his employer", shall receive compensation out of the accident fund, and that such payment "shall be in lieu of any and all rights of action whatsoever against any person whomsoever".[2]

This section of the act was first considered in *Peet* v. *Mills*,[3] in which a motorman was injured in a collision between two trains, due to the failure to use the block signal system with which the road was equipped, the operation of which had been forbidden by the president of the road. An action was brought against the president personally, based upon negligence. It was held that the action was improperly brought, and that compensation could be recovered from the company alone, because "the compensation provided by the act in case of injury to any workman in any hazardous occupation was intended to be exclusive of every other remedy, and all causes of action theretofore existing except as they are saved by the provisos of the act are done away with."

The next and last case involving this point is *Meese* v. *Northern Pacific Railway Company*.[4] An employee of a brewery was killed while loading kegs in a freight car by the negligence of an engineer of the railway company. Although the accident occurred upon the premises of the brewing company, the decedent's dependents brought an action at law against the railroad company. A demur-

[1] Wash. Sess. Laws, 1911, Chap. 74, Sec. 5, p. 345.

[2] Section 5 is qualified by the following proviso in section 3: "If the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or if death results, his dependents, shall elect whether to take under this act or seek a remedy against such other, and if he take under this act the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected and the compensation provided or estimated by this act for such case."

[3] 76 Wash. 437 (1913).

[4] 206 Fed. 222 (1913).

rer to the complaint was sustained, the opinion of the court being that the proviso in Section 3 [5] expressly preserving the right of action at law for the death of an employee resulting from an injury "occurring away from the plant of the employer", clearly showed an intention to except from that provision of the act, which abolished all private controversies and all rights of civil action, what, but for such provision, would have been abolished, and that, as the right of civil action was alone preserved when the injury occurs "away from the plant of the employer", then it was not preserved when it occurred at the plant of the employer.

The argument that the act took away a right of action existing at common law was answered in these words: "There is no right of action at common law to recover for death occasioned by the wrongful act of another. It is a right solely given by statute. A right such as this, which the legislature gives, it may, of course, take away".[6]

The Circuit Court of Appeals [7] reversed the District Court, holding that the act applied only as between employer and employee, and had no effect upon the relation of employee and third person.[8] The *Peet* v. *Mills* case [9] was distinguished on the ground that there the injury was caused by the negligence of the president of the railroad, that is, one who was in the same employ with the workman.

The Supreme Court of the United States, in a case recently decided,[10] has overruled the Court of Appeals' decision and sustained the District Court, holding that the decision of the Washington Supreme Court in *Peet* v. *Mills* [11] was binding upon it, being the construction of a state statute deliberately adopted by its highest tribunal.[12] The suggestion that a construction of the act which took away the employee's or his dependents' right of action against a third person whose negligence was the cause of the injury or death, violated the equal protection clause of the Fourteenth Amendment was said to be "without merit."

[5] *Supra,* note 2.

[6] As a sidelight it is interesting to note that the constitutionality of the Washington Act, which is compulsory, was attacked. A very few words sufficed to dismiss the point. "Upon the argument much was said concerning the constitutionality of a legislative act compelling contribution from one person, or employer, to be used in paying for the negligence of another. This phase of the act is not now before the Court. That is a defense only to be made by those obliged to contribute to, or those charged with the duties of administering the funds contributed."

[7] Meese v. Northern Pac. Ry. Co., 211 Fed. 254 (1914).

[8] Cf. Smale v. Wright Washer Mfg. Co., 160 Wis. 331 (1915).

[9] *Supra,* note 3.

[10] Northern Pac. Rwy. Co. v. Meese (1916), U. S. Adv. Ops. 1915, p. 223.

[11] *Supra,* note 3.

[12] Old Colony Trust Co. v. Omaha, 230 U. S. 100 (1912); Fairfield v. Gallatin County, 100 U. S. (1879).

It is to be noted that while the District Court, in upholding the act, distinctly said that in this case the action was for the recovery of damages for the death of the employee, and that this right of action could be taken away, being merely statutory, the Supreme Court has made no distinction between action by the employee for injuries and actions by his dependents for his death. The former right of action existed at common law; the second right is purely statutory. The further fact that the opinion of the Supreme Court is based upon *Peet* v. *Mills*, in which the employee was suing for injuries received, justifies the conclusion that the decision in this case lays down the principle that the state legislature may abolish a right of action which existed at common law, just as it may abolish the common law defences.[13]

A large number of compensation statutes have specific provisions covering cases where the injury creates a legal liability in a third person. The English act[14] provides that, under such circumstances, the workman may take proceedings both against the third person to recover damages and against any person liable to pay compensation under the act for such compensation, but shall not be entitled to recover both damages and compensation.[15]

The Pennsylvania act[16] provides that "where a third person is liable to the employee or the dependents for the injury or death, the employer shall be subrogated to the right of the employee or th dependents against such third person, but only to the extent of the compensation payable under this article by the employer. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer on account of any future installments of compensation."

The questions presented by the Pennsylvania act are whether the employer who has paid compensation can compel the employee to sue on his right of action against the third person or whether the employer can sue the third person in his own name, if the employee refuses to sue, and also what rights of intervention the employer has, if the employee himself does sue.

P. C. W.

[13] Second Employers' Liability Cases, 233 U. S. 1 (1911).

[14] 6 Edw. VII, Chap. 58, Sec. 6 (1906).

[15] See also Act June 28, 1913, Sec. 29, Ill. Laws 1913, p. 335; Mass. Act 1911, p. 998, Chap. 751, Part III, Sec. 15, as amended by Mass. Acts 1913, p. 371, Chap. 448; Wis. Rev. St. 1911, Chap. 110a, Sec. 2394-25, p. 1541. The Wisconsin Act provides that the making of a lawful claim against an employer for compensation under the act for the injury or death of his employee shall operate as an assignment of any cause of action in tort which the employee or his personal representative may have against any other party for such injury or death and the employer may enforce this liability in his own name.

[16] Act June 2, 1915, P. L. 736, Art. III, Sec. 319.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—TEMPORARY ILLNESS AS A CONTRIBUTING CAUSE OF AN ACCIDENT ARISING OUT OF THE EMPLOYMENT.—The great majority of states which have passed workmen's compensation acts, slavishly following the English act [1] and, taking it for better or for worse, have provided as a condition precedent to the right to compensation that the injured employee must prove that he was injured in an accident which arose "out of" and "in the course of" the employment. The results of the phraseology have been both unfortunate and unsatisfactory, principally due to the fact that upon the happening of any given accident it has not been possible to ascertain with any degree of certainty whether the employee is or is not entitled to compensation.[2] It seems that the general principles which have been derived from the application of the phrase "arising out of and in the course of the employment" are either most vague and indefinite or else purely arbitrary. This is especially true of the words "arising out of".[3]

A recent Rhole Island case [4] is illustrative of the kind of difficulties which may arise in an endeavor to apply this phrase to a given state of facts. Here a hackman, while driving, lost consciousness because of an attack of hernia and fell to the street, sustaining severe injuries. The question whether this was an injury which arose out of his employment was decided by the court in the affirmative. It was strenuously argued that the accident could not be said to have arisen out of the employment but was solely due to the previously diseased condition of the employee. The court, however, held that the fall, and not the disease which occasioned the fall, was the effective and so the proximate cause of the injury. There was a dissenting opinion based on two grounds: first, that the claimant had not discharged the *onus* of proof incumbent upon him inasmuch as he had not sufficiently shown that his unconsciousness was not the sole cause of the fall, and secondly, that the unconsciousness was the proximate cause of the injury and there being no relation between the employment and the cause

[1] The Workmen's Compensation Act, 1906 (6 Edw. VII, Chap. 58).

[2] See the articles by Prof. Francis H. Bohlen on "The Drafting of Workmen's Compensation Acts," 25 Harv. L. Rev. 328, 401, 517, especially 537-547.

[3] California (Laws 1913, Chap. 176) in adopting this phraseology, has been especially arbitrary in the distinctions drawn and it is difficult to see how the various decisions can be reconciled. Where the injury complained of is due in a large measure to a pre-existing physical impairment or a congenital defect then compensation is allowed for the full period of disability, but where it is due to such constitutional diseases as tuberculosis, syphilis, or chronic alcoholism then the injured employee is not entitled to compensation for the extended period of disability (2 Ind. Acc. Com. 249, Cal. 1915; Spangler v. Philbin, *ibid.* 158). The decisions in many of the other states which have adopted this phraseology are likewise confusing but not to such a marked degree.

[4] Carroll v. What Cheer Stables Co., 96 Atl. 208 (R. I. 1916).

of the accident, it could not be said that the injury arose out of the employment. That this view is narrow and unsatisfactory is apparent from an examination of the English and American cases of this class.

In *Wicks* v. *Dowell and Company*,[5] a workman, afflicted with an epileptic seizure while working near the open hatchway of a vessel, fell into the hold. He was allowed to recover for the resulting injuries. In the course of the opinion it was said, "How does it come about that the accident arose out of the employment? Because by the conditions of his employment the workman was bound to stand on the edge of a precipice, and if in that position he was seized with a fit he would almost necessarily fall over. If that is so, the accident is caused by his necessary proximity to the precipice." This clearly shows that the court considered the fall, and not the fit which occasioned the fall, to be the proximate cause of the injury.

This case was cited with approval and followed in the Massachusetts case of *Driscoll* v. *Cushman's Express Company*[6] where the driver of an express wagon became faint while driving and fell from his seat. Here again, the court laid stress upon the fact that the employee was exposed to a substantial and increased risk owing to his occupation. The same result was reached in an opinion of the solicitor of the Department of Commerce and Labor[7] where a night watchman lost consciousness, fell into a camp-fire and was burned. But in Wisconsin, an injury due to an epileptic seizure or temporary illness is not compensible apparently unless the physical condition of the surroundings are unusual.[8]

The *ratio decidendi* in the English cases, on which most of the American cases are based, is difficult and almost impossible to ascertain. One of the tests often given is whether it is "a risk to which the workman is exposed by the nature of the employment".[9] This is clearly too broad, as a risk to which he is subjected to in common with all humanity is a risk incidental to his very existence rather than one incidental to his employment. In the class of cases under consideration it has been suggested that the particular case depends upon this question: "Was it the disease that did it or did the work he was doing help in any material degree"?[10] What is material is apparently a question to be decided in each case as it arises.

[5] 2 K. B. 225 (1905).

[6] 1 Mass. W. C. C. 125 (1913).

[7] *In re* Clements. Op. Sol. Dept. Labor, 228 (1915 Ed.).

[8] Kowalski v. Trostel & Sons, 4 Wis. W. C. Ann. Rep. 17 (1912).

[9] Lord Kinnear in M'Lauchlan v. Anderson, 4 B. W. C. C. 376, 378 (Eng. 1911).

[10] Lord Loreburn in the leading case of Clover, Clayton & Co. v. Hughes, 3 B. W. C. C. 275, 281 (Eng. 1910).

In *Wicks* v. *Dowell* [11] the work and the conditions of the work in which the injured employee was engaged at the time of the accident were considered to have brought about the fall which was the *causa proxima* of his injuries. On the other hand in *Butler* v. *Burton-on-Trent Union* [12] a workhouse master, who fell from the top of a flight of stairs, where he was sitting on evening duty, because of a fit of tubercular coughing, was denied recovery on the ground that the accident did not arise out of the employment and was not due to anything to which the employment required him to expose himself, and hence the work he was doing did not help to cause the injuries in any material degree. But even this test will not explain the *dicta* in some of the cases, though a further consideration of them here would be useless.

So even in the light of the cases that have arisen it is doubtful if any general principles do exist. In *Haley* v. *United Collieries,*[13] Lord Kyllachy in discussing the question, said, "It cannot be solved by reference to any formula or general principle, but must always depend on the circumstances of each case." That Lord Loreburn likewise shares this opinion is evident from the following statement: "Other cases are only useful as illustrations of the way in which these words are applied, and nothing is more fruitless than to attempt to argue by analogy from one set of facts to another set of facts".[14]

As the purpose of a workman's compensation act is to provide compensation to the injured employee without his being forced to spend his wages in endless litigation, any act containing these words would seem to have partially failed in its purpose. It is noteworthy that six states, including Pennsylvania,[15] have omitted the words "arising out of" from their respective acts thereby undoubtedly preventing a great amount of unnecessary litigation.

D. R. H.

TORTS—LORD CAMPBELL'S LEGISLATION—DOES A RECOVERY OF DAMAGES BY DECEDENT BAR AN ACTION FOR DEATH BY HIS ADMINISTRATOR?—At common law, the right of action for an injury to the person abated upon the death of the party injured,[1] according to the familiar maxim, *actio personalis moritur cum persona;* and by a second rule, no civil action could be maintained against any-

[11] *Supra,* note 6.

[12] 5 B. W. C. C. 355 (Eng. 1912).

[13] (1906-1907) Scot. Sess. Cas., 214, 216.

[14] Walters v. Stavely Coal & Iron Co., Ltd., 4 B. W. C. C. 303, 305 (Eng. 1911).

[15] Act of June 2, 1915, P. L. 736.

[1] Pulling v. Rwy. Co., 9 Q. B. D. 110 (Eng. 1882); Hadley v. Bryars' Adm'r, 58 Ala. 185 (1877).

one for causing the death of a human being.[2] Lord Campbell's act,[3] passed in England in 1846, and speedily followed in this country, by similar legislation, overthrew these old rules.

This legislation is of two classes: first, acts which may be called "survival acts," which abolish the first of the common law rules mentioned above, and provide that the decedent's cause of action against the wrongdoer shall survive, either for the benefit of his estate generally, or for the benefit of certain persons named in the statute; second, those which, based more or less directly on Lord Campbell's act, do away with the second rule, and give substantially a new cause of action to certain described beneficiaries for loss sustained by them due to the death of the injured person. These two kinds of statutes should be clearly distinguished, though in some jurisdictions both provisions are combined in one enactment.

Under Lord Campbell's act and similar acts giving a right of action for death caused by the wrongful act of another, the courts have frequently been puzzled by the question whether such right of action is barred where the decedent himself has during his lifetime recovered damages from the wrongdoer for the injury which subsequently caused his death. This problem is well presented in a recent North Carolina case. A person who was injured by the negligence of another brought an action for the injury and recovered a judgment which was duly satisfied. Later death resulted from the same injury for which this judgment had been rendered. The administratrix of the decedent then brought an action against the wrongdoer, under a statute substantially similar to Lord Campbell's act. The opinion of the court, from which one judge strongly dissented, was that the action was barred by the satisfied judgment recovered by the decedent during his lifetime.[4]

Statutes of the kind under consideration provide in general that whenever the death of any person is caused by the wrongful act, neglect, or default of another, in such a manner as would have entitled the party injured to have maintained an action thereof if death had not ensued, an action may be maintained if brought within twelve months after his death in the name of his executor or administrator, for the benefit of certain relatives.[5] The language

[2] Baker v. Bolton, 1 Campb. 493 (Eng. 1808).

[3] 9 and 10 Vict., Chap. 93.

[4] Edwards v. Interstate Chemical Corporation, 87 S. E. 635 (N. C. 1916).

[5] At the present time there are statutes in force in nearly all the states substantially embodying the provisions of Lord Campbell's Act in so far as the right to maintain an action for wrongful death is concerned, though the terms of the statutes differ in respect to the persons entitled to maintain such action, the persons for whose benefit the action may be maintained, the time of bringing the action, the measure and elements of damages recoverable, and the distribution of the same.

of most of the decisions is to the effect that these statutes are not mere "survival acts", which simply continue the right of action of the party injured, but that they create a new and independent cause of action based on the damages caused to the next of kin by the death of the injured person.[6] However, authorities are not wanting to the effect that these acts simply continue or transmit the right to sue which the decedent would have had if he had lived.[7] This doctrine is usually based on the provision of the statute that the act or default of the defendant must have been such as would have entitled the deceased to recover damages in respect thereof; but this reasoning may be answered by the argument that this provision merely defines the class of actions in which the new liability is granted.

If Lord Campbell's act is in essence merely a "survival statute", obviously a recovery of damages or a release by the injured party during his lifetime would bar the maintenance of an action by his representative after his death. But if as said by the court, in one of the first cases that arose under the act,[8] "this act does not transfer this right of action to his representative, but gives to his representative a totally new right of action, on different principles", it may be cogently argued that the decedent cannot during his lifetime release or bar the right of action which the surviving members of his family have for the pecuniary loss resulting to them from his death. It is, however, quite uniformly held that where a person whose death is caused by the wrongful act of another has, in his lifetime, executed a due and proper release to the wrongdoer of all claims for damages on account of the wrongful act, no right of action for the death exists in favor of the heirs or personal representatives of the deceased.[9] From this it will be seen that too much reliance cannot be placed on general words of the courts in saying that Lord Campbell's act creates an entirely distinct cause of action.

The majority of decisions, both in England and America, are in accord with the principal case.[10] There are, however, vigorous dissents in many of these decisions, and a few cases actually hold

[6] Maiorano v. B. & O. R. R. Co., 216 Pa. 402 (1907); Kling v. Torello, 87 Conn. 301 (1914); Michigan Cent. R. R. Co. v. Vreeland, 227 U. S. 59 (1913).

[7] Strode v. St. Louis Transit Co., 197 Mo. 616 (1906); Louisville Rwy. Co. v. Raymond, 135 Ky. 738 (1909).

[8] Coleridge, J., in Blake v. Midland Rwy. Co., 21 L. J. Q. B. 233 (Eng. 1852).

[9] Thompson v. Rwy. Co., 97 Tex. 590 (1904): Brown v. Chicago, *etc.*, Rwy. Co., 77 N. W. 748 (Wis. 1898); Southern, *etc.*, Co. v. Cassin, 111 Ga. 575 (1900).

[10] Littlewood v. N. Y., 89 N. Y. 24 (1882); Golding v. Knox, 56 Ind. App. 149 (1914).

the contrary view.[11] The minority holding is based on the argument that the statute gives an independent right of action for the *death,* and not merely for the *injury;* and that since this right of action does not accrue until the death,[12] it cannot be barred by the decedent's act.

The reasoning of the courts holding the majority opinion is based on various grounds. Some cases say that the question does not turn upon whether the statutory right of action is a new right or merely a continuation of the right of deceased, but upon the intention of the legislature as gathered from the statute.[13] The theory is that the framers of the act did not intend to create a double liability, but merely a single cause of action for the injury, for which there should be but one compensation. There is a further theory that since the statute provides that the cause of action must be one for which the decedent could have recovered if death had not occurred, it is a condition precedent to recovery by the representative that the injured party himself must have been able to recover;[14] and inasmuch as a recovery by the decedent would of course bar a subsequent action by the same person, the condition of the statute is not met.

The minority view, it seems, has much to commend it. The statute gives a right of action which never before existed, and which is purely the creature of that statute. By it the decedent's family are allowed to recover for the loss to themselves, caused by the death of the injured person, a loss which is entirely distinct from the loss to the decedent himself. The fact that the latter recovered damages during his lifetime for the injury to himself, should not prevent his relatives from subsequently suing for the loss which they suffered independently, by being deprived of the value of his services to them.[15] It might perhaps be said in answer that they would be compensated by the fact that the estate in which

[11] Donahue v. Drexler, 82 Ky. 157 (1884); Schlichting v. Wintgen, 25 Hun 626 (N. Y. 1881).

[12] Bolick v. Rwy., 138 N. C. 370 (1905).

[13] In Littlewood v. N. Y., *supra,* note 10, it is said by Rapallo, J., "The form of expression employed in the act shows that the legislature had in mind the case of a party entitled to maintain an action but whose right of action was by the rule of the common law extinguished by his death, and not the case of one who had maintained his action or who had recovered damages."

[14] See Michigan Cent. R. R. Co. v. Vreeland, 227 U. S. 59 (1913), at p. 70.

[15] Mr. Chief Justice Clark, rendering the dissenting opinion in the principal case, said, "Formerly such cause of action could not be maintained. The legislature has now provided that such cause of action can be asserted. . . . It is now asserted by the personal representative for the first time. It has not been paid, and it has not been compromised, and it did not exist until the death of his intestate, who could not, and indeed did not attempt to settle for such wrongful death. . . . The damages sustained by the wrongful death were given by the statute, and accrued subsequently to the

they share has been increased by the amount of the judgment recovered during the decedent's lifetime; but it is extremely doubtful whether this compensation is in fact more than illusory. Moreover, it has been held that even a judgment *against* the decedent during his lifetime will act as a bar to the statutory action.[16]

The question is of course one of construction. The problem is not what the legislature ought to have made the law, but what in fact it did make the law; and the courts have apparently decided that the intent was to subject the wrongdoer to only one action for his wrongful act. How the courts can reconcile this with the almost universal statement that the statute creates an entirely new, distinct, and independent cause of action,[17] is rather difficult to perceive.

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recovery of the judgment by the intestate for his physical injuries, and the statute does not contemplate that payment for injuries and physical sufferings to the plaintiff's intestate should bar the family of the decedent from recovering for the loss of the value of his services to them. This is a subsequent and greater damage, and accrues to a different party."

[16] Schmelzer v. Central Furniture Co., 252 Mo. 12 (1913).

[17] See the cases cited *supra*, in note 6 and note 8.